In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1344

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 3a) is reported at 388 F. 2d 987. The Board's decision and order (Pet. App. 5a-22a) are reported at 163 NLRB No. 9.

JURISDICTION

The decision of the court of appeals was entered on January 22, 1968 (Pet. App. 3a). The petition for a writ of certiorari was filed on April 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

306-807—68

QUESTIONS PRESENTED

1. Whether a union's picketing of a neutral employer's premises constituted unlawful secondary activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act even though, at the time of the picketing, the primary employer has completed his work for the neutral and thus an active business relationship between the two no longer exists.

2. Whether, on the facts of this case, the Board properly concluded that the union, in picketing the neutral employer's premises, was not merely following the "struck product," as permitted by *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58, but was urging a boycott of the neutral's entire business.

3. Whether proof of economic injury to a neutral employer is essential to a determination that picketing is unlawful.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to petition (pp. 1a-2a).

STATEMENT

Since January 1963, petitioner Union had had a labor dispute with Reimann Construction Co., a general contractor in the building and construction industry in the Salem, Oregon, area, over the wages and working conditions of laborers employed by Reimann (Pet. App. 8a). In April 1965, Reimann was engaged by Northridge Industries—owner and operator of a

chain of motels—to build a new motel called the Hyatt Lodge (Pet. App. 7a, 9a). Reimann, using non-union carpenters and laborers, completed its contract for Northridge and left the premises on October 11, 1965, whereupon Hyatt Lodge opened for business (Pet. App. 9a).

In June 1965, Candelaria Investment Co.—which owns, operates, and leases retail store buildings at a location called the Candelaria Shopping Center—engaged Reimann to construct a building at the shopping center. Reimann also performed this contract with non-union carpenters and laborers, and completed work by October 14, 1965 (Pet. App. 8a, 9a). Candelaria's tenant at the new building, Farrell's Ice Cream Parlor, began retail operations on November 9, 1965 (Pet. App. 9a). Neither of the premises were picketed by the union during the construction periods (Pet. App. 9a).

Although the Union had no labor dispute with Northridge, Farrell's, or Candelaria, it nonetheless picketed at the premises of Hyatt Lodge from November 8 to December 20, 1965, and between November 9 and November 15, 1965, picketed sporadically at Farrell's premises (Pet. 9a; R. 25, 26).[1] At both locations the picketing occurred during regular business hours while the occupant of the premises was engaged in normal business operations. The pickets confined their patrolling to the areas around the customer or consumer entrances, and carried signs dis-

[1] "R." refers to the stipulation of facts in Vol. I of the record in the court below, a copy of which is on file with the Clerk of this Court.

playing the following legend (Pet. 9a–10a; R. 25–26): "THIS / BUILDING / BUILT UNDER / SUB-STANDARD/WAGES AND CONDITIONS/BY/ REIMANN CONSTRUCTION COMPANY/SALEM BUILDING TRADES COUNCIL." The picketing did not cause any cessation of work by employees working at the picketed premises or by deliverymen servicing those establishments (R. 27).

Upon charges filed by Cascade Employers Association, to which Hyatt Lodge and Reimann belonged, the Board concluded that the Union's picketing violated Section 8(b)(4)(B) of the Act. The Board found that the picketing, which concededly occurred at the premises of neutral employers, restrained and coerced those employers with an object of forcing them to cease doing business with Reimann (Pet. App. 19a). In so ruling, the Board rejected the Union's contentions that (1) no violation could be found here because there was no existing business relationship between Reimann and the other employers involved at the time of the picketing, and (2) the picketing was privileged under this Court's decision in *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58 (Pet. App. 10a–17a). The Board ordered the Union to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 19a–21a). The court of appeals sustained the Board's findings and enforced its order "for the reasons stated and the authorities cited in the Board's decision and order * * *" (Pet. App. 3a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. Accordingly, there is no occasion for further review.

1. Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union to "threaten, coerce, or restrain" a neutral employer, with an object of forcing "any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." Petitioner contends that such an object could not be shown here because the primary employer (Reimann) had completed his contracts before the Union began its picketing at the neutral employers' premises, and there was no evidence that those employers had any specific plans for entering into future business relations with Reimann (Pet. 7–9). The Board properly rejected this contention.

In enacting Section 8(b)(4)(B), Congress' central purpose was to shield "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. Consistent with this objective, the Board with judicial approval, has interpreted that section as applicable to a wide variety of secondary boycott situations other than the conventional one where the neutral against whom the pressure is exerted is in a direct business relation with the employer with whom the union has

a primary dispute.[2] Similarly, the objective underlying Section 8(b)(4)(B) is furthered by interpreting that section as applying in the circumstances here. As the Board pointed out (Pet. App. 12a–13a):

> Northridge and Candelaria are engaged in businesses which, as the stipulated record discloses, expand through construction of new facilities. * * * As a general contractor in the construction industry in the area where both Northridge and Candelaria operate, Reimann remained within that class of employers to whom future construction contracts might be awarded. Thus, it is apparent that at the very least an object of the picketing was forcing and requiring Northridge and Candelaria to refrain from utilizing Reimann's services for any future construction.[3]

There was nothing improper about the Board's taking such obviously relevant factors into account.

2. Contrary to petitioner's contention (Pet. 9–13), the instant decision does not conflict with *National Labor Relations Board* v. *Fruit & Vegetable Packers*

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[2] See, *e.g.*, *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151–152 (C.A. 9); *National Maritime Union* v. *National Labor Relations Board*, 346 F. 2d 411, 416–420 (C.A. D.C.), certiorari denied, 382 U.S. 840; *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F. 2d 405, 410 (C.A. D.C.).

[3] *Hoffman* v. *Joint Council of Teamsters No. 38*, 230 F. Supp. 684 (N.D. Cal.), cited by petitioner (Pet. 8), arose on a petition for a temporary injunction under Section 10(l) of the Act. To the extent that the views reflected therein support petitioner, they were rejected by the court of appeals when it subsequently reviewed the Board's final order in that case. *National Labor Relations Board* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 26–27 (C.A. 9).

that the picketing was only an appeal to its customers

& Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58. In *Tree Fruits*, the union, which had a dispute with the growers of certain apples, picketed at a retail store selling those apples, with signs appealing to customers of the store not to buy that product. The store was advised not to buy the "struck" apples, and that the pickets would refrain from any action inconsistent with such a limited objective; they in fact did so (*id.* at 60–61, 73–76). In those circumstances, the Court held that consumer picketing, where so confined, did not constitute "restraint or coercion" within the meaning of subparagraph (ii) of Section 8(b)(4), for, "if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product" (*id.* at 72). At the same time, however, the Court noted that, "when consumer picketing is employed to persuade customers not to trade at all with the secondary employer," the picketing falls within the section's proscription because such employer "stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally"; in such case, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer" (*ibid.*).

The Board properly concluded that the instant case presents a situation where the picketing was not closely confined to the primary dispute, but, rather, was employed to persuade customers "not to trade at all" with the neutrals. Thus, as the Board noted (Pet. App. 16a), "the location and timing" of the picketing

disclosed that "it was designed to avoid a confrontation with the primary employer and his employees." Moreover, neither Hyatt Lodge nor Farrell's sold the "product" of the primary dispute, *i.e.*, buildings, to its customers, as did the store in *Tree Fruits*. Accordingly, in appealing to the customers of Hyatt Lodge and Farrell's not to use the buildings constructed by Reimann, the Union was necessarily calling for a boycott of the entire operations of those businesses. See *National Labor Relations Board* v. *Building Service Employees Int'l Union, Local No. 105*, 367 F. 2d 227, 229 (C.A. 10); *National Labor Relations Board* v. *Local 254, Bldg. Service Employees Int'l Union*, 359 F. 2d 289, 292 (C.A. 1), certiorari denied, 389 U.S. 856.

3. Finally, there is no substance to petitioner's contention (Pet. 10–12) that the Board must prove consequent economic loss or some other manifestation of coercion apart from the picketing itself, in order to warrant the application of Section 8(b)(4)(B) to secondary consumer picketing of the type involved here. As the *Tree Fruits* opinion makes explicit, Congress decided, in enacting the 1959 amendments to the Act, that "picketing which persuades the customers of a secondary employer to stop all trading with him was * * * to be barred" (377 U.S. at 71). Where, as here, that "isolated evil" is shown to exist, absence of proof of economic injury is immaterial. Nor is any constitutional problem presented (see Pet. 12–13) in interdicting secondary picketing which seeks to at-

tain such an illegal objective. See *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705.[4]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GARY GREEN,
Attorney,
National Labor Relations Board.

MAY 1968.

[4] Petitioner's remaining argument (Pet. 13–16) relates to certain findings which were unnecessary to the Board's ultimate decision. Thus, petitioner contends that there was no evidentiary support for the finding that the Union failed to picket at Reimann's general office and that the Union had made a prior threat of blacklisting. However, as the Board's decision shows, the finding of a prohibited object rests, not on these matters, but, rather, upon the timing and location of the picketing, the wording and implication of the picket signs, and the Union's failure to adopt techniques designed to mitigate the foreseeable consequences of such picketing (Pet. App. 14a).

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